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ABSTRACT

The way that college faculty and institutions are affected by financial exigency is examined through a study of case law. Selected cases demonstrate the legal principles involved when faculty are dismissed and seek relief in the courts. Cases concerning private colleges relate to tenured faculty, because nontenured faculty in private have legal standing unless their contract is breached. Financial exigency, even if the contract is silent on this possibility, appears to be a justifiable reason for dismissal of tenured faculty. Courts have ruled, according to the contract, that the financial exigency must be "bona fide" and must be the "bona fide" reason for the dismissal. The courts may require that the institution take reasonable efforts to find the dismissed faculty member another suitable position within the institution. Those who decide which faculty to dismiss must use fair and reasonable standards in making the determination. Public colleges base their relationship with faculty both on contract and constitutional provisions. Nontenured faculty must usually show that they have a property right to continued employment, that the dismissal violated their right of liberty, or that the dismissal violated other constitutionally protected rights, such as freedom of speech. For tenured faculty in public colleges, courts have ruled that financial exigency is a legitimate reason for dismissal. Affected tenured faculty must be accorded minimal due process procedures. A bibliography, including case citations, is included. (SW)

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FINANCIAL EXIGENCY AND DISMISSAL
OF HIGHER EDUCATION FACULTY: BE PREPARED

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An Investigation Carried Out
As Part of a Study of the
Legal Aspects of Higher Education

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Introduction

Past events, the present situation, and future projections in higher education indicate that not only has growth slowed, but that budgeting cutbacks are and will be more commonplace in institutions of higher education. This means that colleges and universities, in responding to limited funds, will have to reduce their expenditures. As higher education costs are primarily labor costs, it seems inevitable that reduction of costs will necessitate reduction of faculty.

Faculty members in colleges and universities, like people in most careers, are not immune to these changing economic conditions. Faculty are hired by institutions to provide service, usually in the form of teaching students. Just as faculty are hired, they are fired, terminated, layed off, or their contracts are simply not renewed. Some faculty accept their fate and seek other positions. Other faculty turn to the courts for relief.

This writer will show how faculty and institutions are affected by financial exigency through a study of case law. Cases for review have been selected that demonstrate the legal principles involved when faculty are dismissed and seek relief in the courts. The reader is encouraged to refer to the full text of the cases to obtain a better understanding of the legal requirements, implications, and subtleties of the law. Faculty and administrators would be well served with a better understanding of this most difficult situation that promises to become more commonplace in the near future.

Financial Exigency

"The term refers to a situation in which the financial problems facing an institution are so serious that they may constitute adequate grounds for dismissal of tenured faculty."

(Wilson, J.B. "Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty"
4 J. of College and University Law 189 (1978).)

The above quotation gives some idea of the seriousness of financial exigency. When the job security of even tenured faculty is threatened, what is the status for nontenured faculty? The starting point for understanding the principles involved begins with a look at the differences between public and private institutions as perceived by the courts.

Public v. Private Institutions

Dismissal of faculty in any situation usually involves contractual questions or constitutional questions. Most private institutions, unless involved in the state action, are governed by the terms of the contract between the institution and the faculty member. Public institutions, in addition to being involved with a contract, also have certain constitutional requirements which must be maintained in the relationship between the institution and faculty.

Contracts and Private Colleges

Courts usually look first to a valid contract in settling a dispute. In the case of the American Association of University Professors v. Bloomfield College (346 A 2d. 615), thirteen tenured faculty at this private college were dismissed, allegedly

for reasons of financial exigency. The faculty contract incorporated the tenure provisions of the faculty handbook which stated in part:

" . . . a teacher will have tenure and his services may be terminated only for adequate cause, except in case of retirement for age, or under extraordinary circumstances because of financial exigency of the institution."

"Termination of continuous appointment because of financial exigency of the institution must be demonstrably bona fide. A situation which makes drastic retrenchment of this sort necessary precludes expansion of the staff at other points at the same time, except in extraordinary circumstances." (at 616)

The plaintiffs, dismissed tenured faculty, filed suit in State Court in New Jersey. After the initial decision was favorable to the plaintiffs, the college appealed the case to the Superior Court of New Jersey. A number of questions were at issue in the case.

The first question concerned which side had the burden of proof in the case. The Superior Court held that the trial court was correct in placing the burden of proof on the college. As the condition of financial exigency had to occur before any dismissal could take place, the college first had to prove that such a condition did exist. (at 616)

The Superior Court disagreed with the trial court which stated that a financial exigency did not exist because the college owned property which could have been sold to alleviate their financial problems. The Superior Court believed that the decision to hold or sell the land was best left to the Board of Trustees of the college. (at 617)

Although holding that a financial exigency did exist, the court held that the dismissal of the faculty was improper. The key issue was whether the financial exigency was the bona fide cause of the dismissal. The trial court found and the Superior Court held that the evidence was sufficient to show that the college was trying to abolish tenure. The court ordered the faculty members reinstated. (at 618)

According to the terms of the contract, not only did financial exigency have to exist and be proven by the college, but the college also had to prove that the financial exigency was the cause of the dismissal.

A similar case is that of Browzin v. Catholic University of America (527 F.2d. 843). Dr. Browzin, a tenured engineering professor, was informed in November, 1967, that his appointment would terminate in January, 1971, because of financial difficulties of the college. Browzin sued, charging that his contract had been breached.

In Federal District Court, the university asked for dismissal, and it was granted. Dr. Browzin appealed to the U. S. Court of Appeals.

Catholic University had adopted the 1968 Recommended Institutional Regulations on Academic Freedom and Tenure of the American Association of University Professors as part of the faculty contract.

The District Court had focused on Regulation 4(c) which dealt with financial exigency and discontinuance or abandonment of a program. The third sentence of the regulation reads:

"Before terminating an appointment because of abandonment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions." (at 846)

The District Court held that the "suitable position requirement does not apply to terminations resulting in any way from financial exigency." (at 846) Therefore, the university was under no obligation to seek another suitable position for Dr. Browzin.

The Court of Appeals in a lengthy description which included an appearance by the A.A.U.P. as amicus curiae (friend of the court) resolved that aspect of the case rather simply. They ruled that although Catholic University had dismissed Dr. Browzin because of financial exigency, they had also discontinued his program of instruction and was obligated to make every effort to find him another suitable position in the institution. (at 849)

The Appeals Court did not, however, reverse the District Court. They held the District Court's finding that Dr. Browzin could not prove that the university did not try to find him another suitable position. (at 849)

The Appeals Court recognized that the burden of proof issue should have been settled at the District Court level. Since neither Browzin nor his counsel had raised the issue there, they could not raise it on appeal.

The U. S. Court of Appeals affirmed the District Court's decision that Dr. Browzin's contract had not been breached.

Financial Exigency Not Mentioned in Contract

In the case where the tenure contract makes no reference to dismissal of tenured faculty because of financial exigency, can faculty be dismissed and is it a violation of tenure?

In the case of Krotkoff v. Goucher College (585 F.2d. 675) such a situation existed. Hertha H. Krotkoff's position as a tenured professor at Goucher College (private) was terminated because of severe financial problems of the college. She sued, alleging the dismissal violated the tenure provision of her contract. A jury in the District Court awarded her \$180,000 in damages. The judge, perceiving error, granted a new trial and the case was heard in the U. S. Court of Appeals.

Goucher College was in a retrenchment posture. It froze salaries, cut administrative and clerical staffs, and deferred maintenance. Also, it did not renew the contracts of eleven untenured and four tenured faculty members, including Krotkoff. The non-renewal decisions were based on the need to make substantial changes in the curriculum. Goucher College sent Krotkoff a list of all positions available for the next year. She insisted that any new position carry her present rank, salary, and tenure. The school declined to transfer her to a position in the economics department as the chairman indicated she would need two to four years of training to become qualified. (at 677)

Krotkoff's tenured position made no mention of dismissal for financial exigency. The college conceded that financial exigency is not considered grounds for dismissal for cause.

Judge Butzner, in delivering the opinion of the court, expounded on financial exigency as a legitimate reason for dismissal.

" . . . the conclusion that tenure is not generally understood to preclude demonstrably bona fide dismissal for financial reasons." (at 679)

Citing Johnson v. Board of Regents (377 F. Supp. 227, 234-35), Levitt v. Board of Trustees (376 F. Supp. 945), and Rehor v. Case Western Reserve University (43 Ohio St. 2d. 224), he states:

" . . . where the contracts did not mention this term, [financial exigency] the courts construed tenure as implicitly granting colleges the right to make bona fide dismissals for financial reasons." (at 679)

Continuing:

"No case indicates that tenure creates a right to exemption from dismissal for financial reasons." (Ibid.)

Later in the opinion he states:

"Hence, bona fide dismissals based on financial exigency do not threaten the values protected by tenure." (at 680)

Another question at issue in the case was whether the financial exigency was bona fide. The court, holding in this case that it was, also provided a guideline in determining financial exigency. Judge Butzner stated: "The existence of financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets." (at 681) He cited the A.A.U.P. v. Bloomfield College case mentioned earlier that disposal of capital assets is not a judicial decision.

In deciding whether Goucher used reasonable standards in deciding not to retain Krotkoff and whether it met the suitable position requirement, the court reiterated the legal distinction between private and public colleges. Since Krotkoff did not allege any violation of civil rights and since Goucher College is private, application of the Fourteenth Amendment was not appropriate. Her claims must be settled by reference to her contract. (at 682)

Since the contract made no mention of dismissal for financial exigency, the court had to look at the academic community's understanding concerning tenure to determine these issues.

Referring to the A.A.U.P 1940 Statement on Tenure and Academic Freedom, the court ruled that inherent in the concept of a termination is the requirement that the college use fair and reasonable standards in determining which faculty to dismiss. (at 682) As it [fair and reasonable standards] is an attribute of tenure, it becomes implied in the contract. (Ibid.)

Also inferred was the requirement of assistance in finding another suitable position in the institution. (Ibid.)

After inferring certain elements of the tenure contract, the court limited how far they would go. Citing Browzin v. Catholic University, the judge stated: ". . . in the absence of an explicit contractual undertaking, the evidence discloses that tenure does not entitle a professor to training for appointment

in another dicipline." (Ibid.)

The court affirmed that the district judge did not err and that the college had not violated the contract. (at 683)

Another case of financial exigency in a contract case involved the extent of the exigency within the institution. The issue was whether the exigency could exist within one college or department or whether the whole institution had to be affected to be bona fide.

In Scheuer v. Creighton University (260 N.W. 2d. 595), the court ruled that: "We specifically hold the term "financial exigency" as used in the contract of employment herein may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole." (at 601)

Public Colleges

As indicated earlier, the legal relationship between faculty and the institution in a public college differs from the relationship existing in private colleges. In public colleges, not only does the relationship usually involve a contract, but state and federal laws also apply. Debate involving the dissolution of the faculty-institution relationship usually centers on the United States Constitution, Amendment Fourteen, which states in part:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal

protection of the laws."

United States Constitution
Fourteenth Amendment, Section 1.

Liberty and Property - Nontenured Faculty

In the case of Board of Regents of State Colleges v. Roth (408 U. S. 566), a faculty member was hired for a one-year term and at the end of that year was not rehired. Roth, in his first teaching job, had no tenure rights to continued employment. Roth claimed deprivation of his Fourteenth Amendment rights of procedural due process because the university failed to advise him of the reason for not reappointing him.

The District Court held for Roth and ordered university officials to provide him with a hearing and reasons for his non-reappointment. The case was appealed to the U. S. Supreme Court with the question of whether Roth had a constitutional right to a statement of reasons and a hearing.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount."
(Roth at 569)

Citing Wisconsin v. Constantineau (400 U. S. 433, 437), the court stated:

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

The state, in not rehiring Roth, made no charges against him nor

prevented him from seeking employment elsewhere. The court could find no deprivation of the right of liberty that would require procedural due process guarantees of the Fourteenth Amendment.

The other issue requiring procedural due process involves property interests.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." (Roth at 577)

Roth's contract made no provision for renewal. It was to expire in one year. The court ruled that although Roth had a concern with being rehired, he had no property interest or legitimate claim of entitlement to being rehired. (Roth at 578)

The court could find no deprivation of Roth's liberty interest or property interest that would afford protection of procedural due process. (at 564) The Supreme Court reversed the decision.

The court did rule, in the same case, that certain faculty do have legitimate property interests. A tenured professor dismissed from a public college (at 576, citing Slochower v. Board of Education, 350 U. S. 551) and college professors dismissed during the terms of their contracts (at 576, citing Wieman v. Updegraff, 344 U. S. 183) have property interests that are protected by constitutional procedural due process guarantees.

In a related case, Wells v. Board of Regents (545 F.2d. 15),

eleven nontenured faculty at Murray State College (Kentucky) were informed that their contracts to teach would not be renewed. They were given no reason for the nonrenewal and were not provided an opportunity for a hearing. The court ruled that because none of the plaintiffs had acquired tenure, they had no property right. State law in Kentucky does not recognize any property interest in nontenured teaching jobs. Without a property right, no statement of reasons or hearing was required.

A nontenured faculty member was promoted from instructor to assistant professor during the probationary period toward attaining tenure. When her contract was not renewed, she went to court. The U. S. Court of Appeals ruled that she did not acquire an implied right to tenure just because she was promoted.

Katherine R. Sheppard v. The West Virginia Board of Regents (516 F.2d. 826)

Mabey v. Reagan (537 F.2d. 1036) was another case where a nontenured faculty member was not rehired because of overstaffing in the philosophy department. The court ruled that lack of work and lack of funds was sufficient reason not to rehire him.

In Kaprelian v. Texas Woman's University (509 F.2d. 133), the faculty member had not attained tenure and was not rehired. The court ruled that without tenure, she had no property interest. (at 137) The judge stated: "It is now familiar law that nontenured teachers such as Dr. Kaprelian may be discharged for no reason or for any reason not impermissible in itself or as applied." (at 139)

De Facto Tenure

The U. S. Supreme Court, in the same session they decided the Roth Case, also decided the case of Perry v. Sindermann (408 U. S. 593)

For ten years, Robert Sindermann was employed as a teacher in the state college system of the State of Texas, his last four years as a professor of Government and Social Science at Odessa Junior College under a series of one-year contracts. He had been publicly critical of the college administration. Without explanation or prior hearing, the Board of Regents declined to renew his contract for the next year. The Board did issue a press release alleging Sindermann's insubordination. Sindermann claimed that his dismissal was based on the exercise of his First Amendment right of free speech.

The Supreme Court held the Court of Appeals decision that if the non-renewal of Sindermann's contract was based on the exercise of his First Amendment protection of free speech, then his Fourteenth Amendment right to due process would be violated. (at 593) The Court, citing Pickering v. Board of Education, supra., stated ". . . a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment." (Sindermann at 598)

The question that was similar to the Roth Case involved the claim of a property interest in continued employment. Roth, as

was noted, was unable to prove a property interest.

Although the college had no formal tenure provision, Sindermann argued that a de facto tenure system existed. The Court allowed the possibility that unwritten common law may have established a tenure system in practice. They agreed that Sindermann might have a legitimate claim of entitlement to continued employment which would provide protection of procedural due process. Cited in Perry v. Sindermann, Justice Stewart wrote:

"We have held today in Board of Regents v. Roth that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract." (at 599)

In a set of different circumstances with a nontenured faculty member, the court did recognize de facto tenure under reasonable expectancy of continued employment. Soni v. Board of Trustees (513 F.2d. 347)

Tenured Faculty: Financial Exigency

Under dismissal of tenured faculty for reasons of financial exigency, the case of Johnson v. Board of Regents of the University of Wisconsin System (377 F. Supp. 227), is noteworthy in the detail of the constitutional issues involved.

The 1973-75 (Wisconsin) University System biennial budget was reduced, necessitating the dismissal of some tenured faculty. Additional money was obtained from the state for the purpose of

paying the salaries for 1973-74 of those dismissed in order to permit one year's notice that they would not be paid after that year.

The chancellor of each campus was given the responsibility of deciding how the budget reduction would be implemented and each person selected for termination was notified in May, 1973, that their position could not be funded effective June, 1974.

The University System and the chancellor of each campus followed certain procedures after the decision had been reached as to which faculty members would be terminated. The procedures involved notifying each faculty affected in writing of the reconsideration procedure. The affected faculty could request a reconsideration proceeding before a committee appointed by the chancellor. The committee included at least five tenured faculty members and no person who participated in the original decision to lay off a particular person could sit on the committee during that person's reconsideration proceeding. (at 232)

The plaintiffs were furnished with a written explanation concerning how and why they had been selected for lay-off. Other procedures were instituted by the Board of Regent's central administration to provide documents and information to the plaintiffs.

Each plaintiff requested and received a reconsideration by this committee. The request for reconsideration was limited to:

"(a) Whether there is sufficient evidence to support the decision to lay off, and/or

"(b) Whether there have been material deviations from the procedures established by the President and Chancellor relating to determination of fiscal and programmatic needs of the University." (at 232)

Each campus committee made a recommendation to retain or lay-off affected faculty. Where the recommendation was to retain the faculty, the chancellors rejected the recommendation. Where lay-off was recommended, it was accepted by the chancellor.

Those dismissed faculty, Johnson et. al., filed suit in U. S. District Court alleging denial of minimal procedural due process.

The dismissal action taken by the Board of Regents, first described as "termination" was changed to "lay off" by the Board for a number of reasons.

One reason cited was that fiscal exigency as a reason for termination of tenured faculty was not specified in the state statutes. (at 231) According to Wisconsin law, tenured faculty "may not be terminated involuntarily, except for cause." (Sec. 37.31(1)(b), Wisconsin Statutes, cited at 234) Judge Doyle recognized that the plaintiffs, Johnson et. al., had a property interest and were entitled to procedural due process even though state law was silent on this particular issue. (at 235)

The question before the court was whether the plaintiffs, Johnson et. al., were deprived of procedural due process after the decision was reached to lay them off. Prior to identifying them by name, they were not entitled to procedural protection. (at 239)

Judge Doyle states:

"My basis conclusion is that, so far as the Fourteenth Amendment is concerned, a tenured teacher in a state institution is protected - substantively, so to speak - only from termination or lay off for a constitutionally impermissible reason (such as earlier exercise of First Amendment freedom of expression, or race or religion), and from termination or lay off which is wholly arbitrary or unreasonable. The Fourteenth Amendment requires only those procedures which are necessary to provide the tenured teacher a fair opportunity to claim this "substantive" protection." (at 239)

Stating what he feels to be the minimal procedures, Judge Doyle states:

"furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay off;

"furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision has been arrived at;

"making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and

"providing each plaintiff the opportunity to respond." (at 240)

Concerning the charge of the plaintiffs that the decision-makers were not neutral or impartial, Judge Doyle responded, "It is well within the powers of the state, so far as the federal constitution is concerned, to assign to the chancellors of the respective campuses the authority both to make the initial decision to lay-off specific tenured faculty members and to make the ultimate decision." (at 240)

An issue arose on one campus that part of the decision about whom to lay off involved judgments about personalities.

Judge Doyle ruled:

" . . . the Fourteenth Amendment does not forbid judgments about personalities in this situation, nor does it require adversary proceedings." (at 242)

Summary

The existence of financial exigency presents an unusual situation both for faculty and institutions. Economically, it appears that increasingly more institutions will experience financial problems which may necessitate the removal of faculty, both tenured and nontenured.

In private colleges not involved with state action, the contract is the usual source of authority governing the relationship between faculty and the institution. Documents, such as a faculty handbook, may be incorporated by reference into the contract. When a contract is silent on an issue, certain elements may be implied by reference to past custom and usage at the institution, and indeed, to custom and usage of the academic community in general.

The cases cited in the private college section relate to tenured faculty. Faculty without tenure in a private college have very little legal standing unless their contract is breached. Removing them usually involves not renewing their contract. Financial exigency, even if the contract is silent on this possibility, appears to be a justifiable reason for dismissal of tenured faculty. Courts have ruled, according to the contract, that the financial exigency must be bona fide and must be the bona fide reason for the dismissal. The courts may require that the institution take reasonable efforts to find the dismissed faculty another suitable position within the institution.

The burden of proof issue would appear to fall to the institution as usually the financial exigency must be proven to exist. Those who decide which faculty to dismiss must use fair and reasonable standards in making the determination. Unless explicitly stated in the contract, retraining the affected faculty for a new position will probably not be required of the institution. It also appears that if the exigency is limited to one college or department, it may still be valid.

Public colleges base their relationship with faculty both on contract and constitutional provisions. Nontenured faculty must usually show that they have a property right to continued employment, that the dismissal violated their right of liberty, or that the dismissal violated other constitutionally protected rights such as freedom of speech, to be entitled to procedural due process. Having procedural due process does not mean that faculty cannot be dismissed; it does require that certain procedures, primarily the right to be heard, must be followed before the termination occurs.

For tenured faculty, in public colleges, courts have ruled that financial exigency is a legitimate reason for dismissal. Again, the decision on whom to dismiss cannot be wholly arbitrary or unreasonable. Affected tenured faculty must be accorded minimal due process procedures.

As institutions of higher education are forced to face the necessity of dismissing faculty for reasons of financial exigency, they will become more aware of the legal considerations involved. For

faculty affected by these decisions, they will become more alert to their rights under the law and, if necessary, within the judicial system.

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